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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO. 943

CLIFTON WRIGHT and JESSIE PARAMORE,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND CIRCUIT

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Reference to Opinion Below

The judgment of conviction was affirmed in open Court October 7, 1970. No opinion was rendered. A copy of said decision is appended.

Grounds for Jurisdiction

This is a criminal proceeding brought pursuant to Title 21, United States Code, Sections 173 and 174.

The judgment sought to be reviewed is dated October 7, 1970 and was entered October 7, 1970. There are no orders

respecting a rehearing, and the notice of appeal was filed on the 5th day of June, 1970, in the United States District Court for the Southern District of New York. A copy of said notice of appeal is appended.

Jurisdiction is conferred on this Court pursuant to Title 28, United States Code, Section 1254(1).

Cases believed to sustain the jurisdiction of this Court are:

Jones v. *United States,* 78 S. Ct. 1253, 357 U. S. 493.
On Lee v. *United States,* 343 U. S. 747, 72 S. C. 967.
Silverman v. *United States,* 365 U. S. 505, 81 S. C. 679.
Agnello v. *United States,* 269 U. S. 20, 46 S. C. 4.
Wong Sun v. *United States,* 371 U. S. 471, 83 S. C. 407.
United States v. *Jeffers,* 342 U. S. 48, 72 S. C. 93.
Berger v. *New York,* 388 U. S. 41.
Katz v. *United States,* 389 U. S. 347, 88 S. C. 507.
United States v. *White,* 405 F. 2d 838; cert. granted, 394 U. S. 957 (1969).

Question Presented

The question presented here is whether conversations allegedly overheard by government witnesses through a radio receiver tuned to a Kel set secreted on the person of Farland Bedford, the informant, without prior Court authorization, and held admissible by the District Court Judge over objection, violated petitioners' Fourth Amendment rights to be secure in their persons and property.

Statement

Petitioners were indicted in the United States District Court for the Southern District of New York on or about the 24th day of November, 1969, alleging a violation of Title 21, United States Code, Sections 173 and 174, in a three count indictment, alleging in the first count a sale of heroin on the 1st day of November, 1968; the second count alleged a sale of heroin on the 13th day of November, 1968; and the third count alleged a conspiracy to violate Title 21, Sections 173 and 174 of the United States Code.

A motion as to each petitioner was made to suppress certain taped conversations received as a result of electronic surveillance made by agents without court authorization. These motions were withdrawn in open court when the Assistant United States Attorney stated that he did not intend to use such tapes.

Thereafter, on the 17th day of April, 1970, the government moved to sever count three as to each petitioner, which was granted. A jury was selected and on the 20th day of April, 1970, trial began.

During the government's case, the Assistant United States Attorney made it known to the court and defense counsel that he intended to introduce certain testimony in which government witnesses would testify to conversations overheard over a radio receiver transmitted from a Kelco set secreted on an informer, at which time counsel for petitioners requested a side bar, and after colloquy at the side bar, the District Court Judge ordered a hearing for the purpose of determining whether the conversations sought to be testified to by the government's witnesses should be suppressed or not. After the hearing to determine the admissibility of the conversations allegedly heard by the government's witnesses from the said Kel set, the court denied the motion to suppress and held the conversations admissible.

On the 27th day of April, 1970, the jury returned a verdict of guilty as to each petitioner on both counts remaining in the indictment. On the 4th day of June, 1970, the defendant Wright was sentenced to a period of nine years on each count to run concurrently and defendant Paramore was sentenced to a term of five years on each count to run concurrently.

POINT I

The question presented here is so substantial as to require plenary consideration.

The grave substantial nature of the question presented here would appear to partly lie in the conflict of decisions of the Second Circuit in *United States* v. *Kaufer,* 406 F. 2d 550, aff'd, 394 U. S. 458, in which the Second Circuit rejects the argument that *Katz* v. *United States,* 389 U. S. 347, 88 S. C. 507, is the controlling authority holding conversations inadmissible without prior Court authorization, asserting no Fourth Amendment rights are violated of the accused since the conversation was overheard with the consent of the informant who was a party to such conversation, in contrast to the decision of the Seventh Circuit in *United States* v. *White,* 405 F. 2d 547, 838 (*en banc*), cert. granted, 394 U. S. 957, which holds that *Katz* is the controlling authority and such unauthorized conversations are inadmissible.

POINT II

The admission of conversations by government witnesses overheard through a radio receiver tuned to a kel set secreted on the informer, without prior judicial approval, violated the Fourth Amendment rights of appellants.

As such, it would appear that the controlling authority holding such conversation inadmissible is *Katz* v. *United States, supra,* in which the Court in holding the bugged conversation from the telephone booth used by Katz inadmissible, reiterated that the Fourth Amendment governs not only tangible items, but extends as well to recordings of oral statements overheard without any technical trespass under local law.

Katz has apparently overruled *On Lee* v. *United States,* 343 U. S. 747, 72 S. C. 967, which had been the authority for holding such conversations admissible on the grounds that the informant was an invitee in the place of business of On Lee, and On Lee could not be heard to object to conversations he had willingly participated in, in his own place of business; *White, supra,* holding that the bugged informer cannot be distinguished from Katz telephone booth, because such is a surreptitious invasion of defendant's rights by the government, and when one party to a conversation is a government informer, his consent to bugging of the conversation does not make it legal.

In *Silverman* v. *United States,* 365 U. S. 505, 81 S. C. 679, the court held that where police officers attached an electronic device so called "spike mike" to a heating duct in the house used by defendant, and in effect, turning the duct into a gigantic microphone running through the entire house, violated the Fourth Amendment and conversations overheard by the officers were inadmissible in prosecution for gambling offenses.

Governmental interceptions of private conversations without prior judicial control are *per se* inadmissible in evidence in a Federal Court and must be suppressed where timely motions are filed. *United States* v. *Jones,* 292 F. Supp. 1001, so too, searches conducted without warrants have been unlawful notwithstanding facts unquestionably showing probable cause; *Agnello* v. *United States,* 269 U. S. 20, 46 S. C. 4; *Wong Sun* v. *United States,* 371 U. S. 471, 83 S. C. 407; *United States* v. *Jeffers,* 342 U. S. 48, 72 S. C. 93; *Berger* v. *New York,* 388 U. S. 41, 1 CrL 3120.

CONCLUSION

The petition herein for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN H. MITCHELL,
Attorney for Petitioners,
299 Broadway,
New York, New York 10007.

Opinion (Judgment) Below.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of October, one thousand nine hundred and seventy.

Present: HON. LEONARD P. MOORE,

HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLIFTON WRIGHT and JESSIE PARAMORE,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Notice of Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

69 Cr. 821

UNITED STATES OF AMERICA,

against

CLIFTON WRIGHT and JESSIE PARAMORE,
Defendants.

SIR:

PLEASE TAKE NOTICE, that the above named defendants Clifton Wright and Jessie Paramore, hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment of conviction for a violation of Title 21 of the United States Code, Sections 173 and 174 and sentenced respectively on the 4th day of June, 1970, to serve 9 years on each of two counts to run concurrently and 5 years on each of two counts to run concurrently in a Federal penal institution to be designated by the Attorney General of the United States.

Dated: New York, New York, June 4, 1970.

Yours, etc.,

NATHAN H. MITCHELL,
Attorney for Defendants,
299 Broadway,
New York, New York.
MALCOLM C. MCFADDEN,
Attorney for Defendants,
299 Broadway,
New York, New York.

To:

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney,
Southern District of New York,
Foley Square, New York.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 943

CLIFTON WRIGHT and JESSIE PARAMORE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted by a jury in the United States District Court for the Southern District of New York of substantive narcotics offenses on separate dates in October and November 1968, in violation of 21 U.S.C. 173 and 174. Wright was sentenced to concurrent terms of nine years on each count; Paramore received concurrent terms of five years on each count. The court of appeals affirmed from the bench without opinion (Pet. 7).

A conversation between Wright and government informant Bedford shortly before the first sale was monitored by means of an electronic transmitter concealed on the person of the informant with the latter's consent. Paramore was not a party to this conversation. The agents who had overheard the conversation and the informant all testified as to its contents at trial.

This overheard conversation was peripheral to and preceded the actual sale in October and was unrelated to the November sale.[1] Cf. *Chapman* v. *California*, 386 U.S. 18; *Benton* v. *Maryland*, 395 U.S. 784, 791. Moreover, unlike *United States* v. *White*, No. 13, this Term, the informant testified as to its contents at trial.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.[2]

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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[1] Its text is set forth in the government's brief in the court of appeals, which we are filing herewith, at p. 5, n. **.

[2] Even if the Court is of the view that the petition should be deferred until after *White* is decided, we point out that petitioner Paramore could gain nothing from a holding in *White* contrary to the government's position in that case, since he was not a party to the overheard conversation. *Alderman* v. *United States*, 394 U.S. 165.

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